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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A Division of Loew's Theatres, Inc.,
Petitioner,

v.

FRANCES P. PONS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER, LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. for Cert., pp. 2a-7a) is reported at 549 F. 2d 950. The opinion of the District Court for the Middle District of North Carolina (Pet. for Cert., pp. 7a-12a) is unofficially reported at 69 F.R.D. 576, 13 FEP Cases 444.

JURISDICTION

The judgment of the Court of Appeals was entered on 2 February 1977, vacating the judgment of the District Court and remanding same for further proceedings (Pet. for Cert., p. 1a). Lorillard, a division of Loew's Theatres, Inc. ("Lorillard"), defendant in the District Court and respondent in the Court of Appeals, filed a Petition for a Writ of Certiorari on 31 March 1977. On 27 June 1977, the Court granted the Petition for Certiorari. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The relevant statutory provisions are §§ 4 and 7 of the Age Discrimination in Employment Act of 1967 ("ADEA") (81 Stat. 602, 29 U.S.C. §§ 621, et seq.) and are set forth in the Appendix to this Brief, infra, pp. 1a-3a; Fair Labor Standards Act of 1938, as amended ("FLSA"), §§ 11(b), 15, 16 and 17 (App., infra, pp. 4a-5a); Title VII of the Civil Rights Act of 1964 ("Title VII"), §§ 703-706 (App., infra, pp. 6a-8a).

QUESTION PRESENTED

Whether the Seventh Amendment, or the ADEA, requires a jury trial upon demand of one of the parties in an action for injunctive relief and back wages under that Act.

STATEMENT

In September 1975, a complaint was filed against petitioner Lorillard in the United States District Court for the Middle District of North Carolina, in which it was alleged that respondent, a former employee of Lorillard, was terminated by her employer when she was forty-eight years of age and holding the position of financial services coordinator, as a part of its policy to discharge older employees and to retain young people as employees wherever possible (App. 3-4). In her complaint, respondent sought injunctive reinstatement as an employee, and thereafter not to discriminate against her because of her age, monetary damages consisting of lost wages from date of discharge to date of judgment, together with an equal amount of liquidated damages, costs and attorneys' fees (App. 4).

Respondent's complaint was accompanied by a timely written demand for trial by jury on all issues of fact in the action (App. 5). On Lorillard's motion to strike respondent's jury trial demand, the District Court ordered that respondent's demand for a jury trial be stricken and that the action be placed on the non-jury calender (App. 10). The order was accompanied by a Memorandum Opinion (Pet. for Cert., pp. 7a-12a). In its opinion of January 21, 1976, the District Court held that respondent's Seventh Amendment right to jury trial turns upon the lost wages issue,

noting that she "makes no argument that the other issues[1] will support trial by jury, and there is no authority to support such an argument." The District Court considered that actions for lost wages under the ADEA are logically analogous to actions under Title VII of the Civil Rights Act of 1964, the employment discrimination provisions of the Act, and observed that the Courts of Appeals for the Fourth, Fifth, Sixth and Ninth Circuits have found an award of back pay under Title VII to be equitable. *Pons* v. *Lorillard,* 69 F.R.D. 576; Pet. for Cert., pp. 7a-12a.[2]

An interelocutory appeal of the District Court order to the Court of Appeals was allowed. 28 U.S.C. § 1292(b), FRAP 5.

While the case was pending in the Court of Appeals, and prior to oral argument, respondent filed a motion in that court for leave to amend her complaint upon remand to the District Court, by adding a new paragraph alleging that "by discriminating against plaintiff, defendant acted purposefully and intentionally, willfully, wantonly, oppressively and with a reckless

[1] Referring to plaintiff's injunctive reinstatement, liquidated damages, attorneys' fees and costs. The District Court noted that "in the hearing on the defendant's Motion to strike the jury demand, plaintiff candidly conceded that the liquidated damages issue would not be triable to a jury." Pet. for Cert., pp. 7a-8a, n. 2. See also *Pons* v. *Lorillard*, 549 F.2d 950, 951, n. 3.

[2] Other cases holding that parties to an ADEA action are not entitled to a jury trial are *Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), Pet. for Cert., pp. 12a-19a; *Looney* v. *Commercial Union Assurance Cos.*, 428 F. Supp. 533 (E.D. Mich. 1977); *Hannon* v. *Continental National Bank*, 427 F. Supp. 215 (D. Colo. 1977); *Polstorff* v. *Fletcher*, 14 FEP Cases 1638 (N.D. Ala. 1977); *Brennan* v. *International Harvester Co.*, 7 Empl. Prac. Dec. ¶ 9171 (N.D. Ill. 1974).

disregard of plaintiff's rights;" and that "in addition to loss of wages, plaintiff has suffered depression and anxiety, and humiliation and embarrassment proximately and directly as a result of defendant's wrongful conduct;" and praying for relief and that the Court "award plaintiff monetary damages consisting of lost wages and all of her other actual damages, statutory liquidated damages, and common law punitive damages" (App. 11-12). Lorillard responded by opposing this motion and took the position that any motion to amend the complaint should be filed with the District Court upon remand, and was not properly presented to the Court of Appeals, and that the motion failed to adequately state the grounds on which it was based (App. 13-18).

The Court of Appeals vacated the District Court's order, holding that the jury demand should not have been denied, and remanding the claim for back pay for trial by a jury; it also remanded respondent's motion to amend her complaint to include a claim for punitive damages for presentation to the District Court (Pet. for Cert., p. 6a, n. 7).

The Court of Appeals vacated the order of the District Court and remanded the claim for back pay for trial by a jury in an analysis as follows: First, Congress intended by the inclusion of the phrase "legal . . . relief" in Sections 7(b) and 7(c) of the ADEA (App., infra, 2a-3a) to empower a federal court to grant litigants the right to a jury trial. Second, the enforcement provisions of the ADEA—fair age employment—are different from those of Title VII—fair employment—but are not different from the enforcement clauses of Title VIII—fair housing—as construed in *Curtis* v. *Loether,* 415 U. S. 189 (1974). Third, the terms of the

ADEA command a jury trial in claims for lost wages because its enforcement section incorporates by reference the enforcement remedies of § 216(b) of the FLSA, and same uniformly are accorded a jury trial. Fourth, an ADEA claim for lost wages meets the three-pronged test enunciated by this Court in *Ross* v. *Bernhard*, 396 U. S. 531, 538 (1970), concluding that ADEA claims for lost wages are analogous to the common law action for breach of contract by wrongful discharge or by an action in tort. *Pons* v. *Lorillard*, 549 F. 2d 950 (1977), Pet. for Cert., pp. 2a-7a.[3]

ARGUMENT

I. Congressional Intent as to ADEA Actions Does Not Require Jury Trial

Congress passed the ADEA to ensure that hiring or termination decisions are based on obvious evaluations of individuals' potential for job performance, rather than on misconceptions about the effects of age on ability. Its statutory purpose is to promote "employment of older persons based on their ability rather than age; to prohibit arbitrary discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1970).

[3] Other cases holding that parties to an ADEA action are entitled to a jury trial are: *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977); *Wilson* v. *Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86, n. 4 (5th Cir. 1974); *Bertrand* v. *Orkin Exterminating Co., Inc.*, 419 F. Supp. 1123 (N.D. Ill. 1976); *Chilton* v. *National Cash Register Co.*, 370 F. Supp. 660 (S.D. Ohio 1974); *Murphy* v. *American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976); *Cleverly* v. *Western Electric Co.*, 69 FRD 348, 13 FEP Cases 1443 (W.D. Mo. 1975).

As the ADEA was enacted in 1967, Congress could have amended Title VII of the Civil Rights Act of 1964, which proscribes employment discrimination on the basis of race, sex, religion or national origin to include age as a protected classification since the prohibitions in both Acts are substantially the same. The ADEA was established as an independent statutory scheme incorporating the enforcement procedures of the Fair Labor Standards Act. One of the considerations for this choice was administrative convenience, namely, the feeling in Congress that the Equal Employment Opportunity Commission, which had been created to process complaints from aggrieved parties under Title VII, was overburdened and that age discrimination complaints could be handled more efficiently by the Wage and Hour Division of the Department of Labor.[4]

The focus of the ADEA, like Title VII, is to insure the employment of individuals without regard to arbitrary, and therefore, forbidden criteria.

The operative enforcement provisions of the two Acts are quite similar. The ADEA gives "the Court . . . jurisdiction to grant such legal or equitable relief

[4] See 113 Cong. Rec. 31254 (1967) (remarks of Sen. Javits, co-sponsor of the Senate version of the bill); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 141-43, 412-14 (1967). See also, First Annual Report, Equal Employment Opportunity Commission to Congress, in accordance with § 705(d) of the Civil Rights Act of 1964, for the fiscal year ended June 30, 1966, noting that "by June, 1966, the Commission had been deluged with 8,854 individual complaints" (p. 5). In the Second Annual Report, for the fiscal year ended June 30, 1967, there were a total of 12,927 charges awaiting disposition (p. 4).

as may be appropriate," while Title VII provides that "the court . . . may order such affirmative action as may be appropriate." In providing examples of appropriate relief, the statutes give the same remedies—employment or hiring, reinstatement, and back pay; and each statute specifically provides that relief is not restricted to the enumerated examples.

The substantive and procedural provisions of the ADEA and Title VII are similar. The Secretary of Labor is empowered to bring an action on behalf of an aggrieved party under the ADEA, 29 U.S.C. § 626(b) (1970), while the Equal Employment Opportunity Commission is empowered to bring an action on behalf of an aggrieved party under Title VII, 42 U.S.C. § 2000e-5(f)(2).

The ADEA, like Title VII with respect to all traits but race, provides that it shall not be unlawful for an employer to base his decisions on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000e-3(b).

ADEA courts have recognized the similarity between the two Acts in interpreting the former. *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975); *Moses* v. *Falstaff Brewing Corp.,* 525 F. 2d 92 (8th Cir. 1975); *Hodgson* v. *First Federal Savings & Loan Assn.,* 455 F. 2d 818, 822 (5th Cir. 1972).

The threshold determination should be made as to whether the ADEA provided, or whether Congress intended that it provide, for a jury trial. Only if the Act does not so provide does the Court reach the question of the Seventh Amendment's applicability. *Pernell* v. *Southall Realty,* 416 U. S. 363, 365 (1974).

The ADEA contains no express or implied provision concerning the right to a jury trial for alleged violations of the Act.[5]

The Act's meager legislative history does not reveal that Congress contemplated or intended that issues be tried to juries. While the right to jury trial was mentioned occasionally and some members of Congress assumed that juries would hear ADEA cases,[6] none of these references clearly indicate congressional intent on the subject.

Title VII of the Civil Rights Act of 1964 had been in effect for three years at the time of the enactment of the ADEA, and congressional concern over jury trial in the civil rights area was manifest prior to the adoption of the ADEA. See, e.g., *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 89th Cong., 2d Sess., ser. 16, at 1183 (1966).

Title VII's express preservation of the right to jury trial in criminal contempt cases, 42 U.S.C. § 2000h (1970), suggests that Congress did not provide jury trials for civil violations of Title VII or for its progenitor, ADEA actions. The ADEA draws the bulk of its statutory heritage from Title VII. The Court in

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[5] For federal statutes which specifically confer the right of jury trial, see e.g., 28 U.S.C. § 2402 (civil actions for internal revenue tax refunds); 28 U.S.C. § 2713 (actions of attachment in postal suits involving debts of defaulting postmasters, contractors or other post office employees); 46 U.S.C. § 688 (actions by seamen for injury or death under Jones Act); 7 U.S.C. § 135g (actions for violations of labeling and purity of insecticides).

[6] In a colloquy on the floor, Senator Javits said that in an age discrimination suit "a jury will answer Yes or No," 113 Cong. Rec. 31255 (1967).

Morelock v. *NCR Corp.*, 546 F. 2d 682 (6th Cir. 1976), characterized the ADEA as "an offspring of the Civil Rights Act of 1964" and noted that the similarities between the two Acts were "hardly accidental." Id., at 686. The legislative history of the ADEA and Title VII demonstrates that although the express enforcement provisions of these Acts differ, the provisions of each Act originated in the National Labor Relations Act and were respectively modified in order to permit individuals to seek relief through civil litigation. See H. R. Rep. No. 805, 1967 U. S. *Code Cong. and Admin. News*, pp. 2213, 2218.

II. ADEA Rights and Remedies Are Beyond the Seventh Amendment Ambit

As Congress has not expressly provided a jury trial under the ADEA, the matter is governed by the Seventh Amendment. The Amendment's deceptively simple language belies the problems involved in its application to the circumstances of a particular case.

The extent of the problems presented by the Seventh Amendment's guarantee since its adoption in 1791 is demonstrated by this Court's occasion to interpret the Amendment in 94 opinions, from *Bank of Hamilton* v. *Dudley's Lessee*, 27 U. S. 492 (1829), where the basic principle was first articulated, to *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974). The problem of ascertaining whether a particular action is legal or equitable continues to perplex the courts; only the tests have changed.

The basic principle to be applied was set forth by Mr. Justice Marshall in *Curtis* v. *Loether*, 415 U. S. 189, 194-195 (1974):

> "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, *if the statute creates legal rights and remedies, enforceable in an action for damages* in the ordinary courts of law. . . . But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts where there is obviously no functional justification for denying the jury trial right, a jury trial must be available *if the action involves rights and remedies of the sort typically enforced in an action at law.*" Id., at 194-195 (footnote omitted) (emphasis added).

This principle was also restated in *Pernell* v. *Southall Realty*, 416 U. S. 363, 374-376 (1974);

> "Whether or not a close equivalent to Section 16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, *provided that the action involves rights and remedies of the sort traditionally enforced in an action at law*, rather than in an action at equity or admiralty." 416 U. S. at 375 (emphasis added).

The entire area of constitutional right to jury trial in employment discrimination actions is confusing and confused. This Court has not previously had occasion to determine whether the rights and remedies created by acts relating to discrimination in employment are of the sort traditionally involved in an action at equity or in law. As discussed later in this Brief, reference is made to the problem in *Curtis* v. *Loether*, *supra*, but it was stated that "we of course express no view on the jury trial issue" in the Title VII context, and also to Mr. Justice Rehnquist's concurring opinion in Albemarle Paper Co. v. Moody, 422 U. S. 405, at 441 (1974).

A. The test of history

Because the Seventh Amendment seeks to *preserve* an existing standard for determining the scope of the right to jury trial rather than to establish a new standard, this Court has suggested in *Ross* v. *Bernhard* that an historical approach to the question is one element of a three-pronged inquiry:

> "[T]he 'legal nature' of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." 396 U.S. at 538, n. 10 (1970).

Stated differently:

> "Where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy." 396 U. S. at 543, n. 1 (Stewart, J., dissenting).

The Court of Appeals in the case under review relied upon the rationale of *Ross*, stating that "the ultimate analysis to determine whether a suit is one 'at common law' within the Amendment seems to be the three-pronged classical test" and concluding that the present action met such a test (Pet. for Cert., pp. 5a-6a). The *Ross* test was cited in *Curtis*, 415 U. S. at 194, 195.

The nature of the "remedy" element in the *Ross* test has reference to history. Traditionally, actions for money damages for tort or breach of contract were legal, while actions for injunction or for specific performance were invariably equitable. This difference in the relief granted remains the most obvious ground for differentiating law and equity. Debatable questions arise where, as in the case under review, money is requested by respondent, and it is the kind of money award which could have been granted by equity. Although *Ross* involved a situation in which a statutorily created right of action was being asserted, it did not deal with the process of finding a legal or equitable characterization for the statutory right.

As pointed out by Mr. Justice Stewart in his dissenting opinion in *Ross* (with whom Mr. Chief Justice Berger and Mr. Justice Harlan joined), "[t]he fact is, of course, that there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and, 'like chameleons [they] take their color from surrounding circumstances.'" 396 U. S. at 550 (footnote omitted).

Because the Seventh Amendment is preservative in character and neither enlarges nor restricts the right of jury trial as it was known to the English common law at the time the Amendment was adopted in 1791, the historical test has proven to be an unsatisfactory means of resolving the jury trial issue. The *Ross* test appears to offer no improvements over the strict historical test, merely breaking the historical test into components without eliminating any of its unsatisfactory attributes.

B. Judicial precedent mandates non-jury trial

Even if it be determined that respondent's action under ADEA to redress her claimed employment discrimination is an action presenting a "right" of the sort traditionally enforced in an action at law does not, in itself, mandate a right to jury trial. The Seventh Amendment does not apply unless the action involves rights *and* remedies of the requisite nature. *Curtis* v. *Loether* and *Pernell* v. *Southall Realty, ante,* p. 11.

Accordingly, an analysis of the right to jury trial under ADEA should be made in terms of the existing case law—however unsatisfactory the basis of this case law may be conceptually. An examination of the judicial handling of the jury trial issue under similar remedial statutes which, like ADEA, involve both injunctive relief and monetary awards reveals that the courts have consistently denied the right to jury trial in such actions. Almost without exception, courts have denied the right to jury trial in employment discrimination cases when a plaintiff seeks injunctive relief and back pay as in the present action. This Court noted in *Curtis* v. *Loether*, 415 U. S. at 196-7, that in Title VII actions, "the courts of appeals have held that jury trial is not required in an action for reinstatement and back pay," citing *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), cert. dismissed under Rule 60, 404 U. S. 1006 (1971); *McFerren* v. *County Board of Education*, 455 F. 2d 199 (6th Cir. 1972); *Harkless* v. *Sweeney Independent School District*, 427 F. 2d 319 (5th Cir. 1970), cert. denied, 400 U. S. 991 (1971); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966) (en banc).

1. *Title VII Cases*

The Court in *Curtis* noted that "in Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution;" and that those courts also "have relied on the fact that the decisions whether to award backpay is committed to the discretion of the trial judge;" and finally, that in a sense the award in those cases could

be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. 415 U. S. at 197.

Subsequent to *Curtis*, this Court has had occasion to examine more closely the nature of a back-pay award in Title VII actions by private individuals. In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), one of the issues involved was what standards should a federal district court follow in deciding whether to award or deny back pay to employees who have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice. The Court stated:

> "... It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are of course left in the first instance to the district courts. ..." 422 U. S. at 415-416 (footnote omitted).

It was noted that the district court's discretion in Title VII cases "is equitable in nature, see Curtis v. Loether, 415 U. S. 189, 197" and that "Congress invokes the Chancellor's conscience to further transcendant legislative purposes" in employment discrimination litigation. This Court in *Albemarle* employed language that is equally apposite to actions brought by private individuals under the ADEA for injuries occasioned by age discrimination:

> "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is

shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice,' *Brown* v. *Swann,* 10 Pet. 497, 503; see also *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 397-398. '[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' *Bell* v. *Hood,* 327 U. S. 678, 684. Title VII deals with legal injuries of an economic character occasioned by racial or other anti-minority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' *Louisiana* v. *United States,* 380 U. S. 145, 154. And where a legal injury is of an economic character,

> '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicker* v. *Hoppock,* 6 Wall. 94, at 99." 422 U. S. at 416-419.

And Mr. Justice Rehnquist's words concerning the discretionary nature of an employment award is instructive:

> "To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay not withstanding a finding of unlawful discrimination, the nature of the jurisdiction which the Court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the Court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment." 422 U. S. at 443.

In *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976), involving the question of whether identifiable applicants who were denied employment because of race in violation of Title VII may be awarded seniority status retroactive to the dates of their employment applications, it is stated, with respect to Title VII, that "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to *effect restitution,* making whole insofar as possible the victims of racial discrimination in hiring." 424 U. S. at 764 (emphasis added).

The Court also stated:

> "We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts." 424 U. S. at 770.[7]

2. *NLRA Cases*

The question whether the trial of a former employee, who claims to have been discriminatorily terminated, without a jury violates the Seventh Amendment arose

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[7] "When a district court orders an award of back pay or retroactive seniority, it exercises equitable powers expressly conferred upon it by Congress." 424 U.S. at 785 (Powell, J., dissenting).

in this Court in the context of a proceeding for reinstatement and back pay under the National Labor Relations Act. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936). There, an order of the NLRB which, in addition to directing reinstatement of unlawfully discharged employees, also directed back pay to these employees, was held not to violate the Seventh Amendment. The decision was rested on the ground that the case was not a suit at common law or in the nature of such a suit, and that the proceeding was one unknown to the common law. Mr. Chief Justice Hughes, writing for a majority composed of Justices Brandeis, Stone, Roberts, and Cardozo, rejected the employer's argument that the backpay "requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury," stating:

> ". . . Thus [the Seventh Amendment] has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law. . . .
>
> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

The holdings of the Court in *Jones & Laughlin* were followed in *Associated Press* v. *NLRB*, 301 U. S. 103, 133 (1937), and *NLRB* v. *Mackay Radio and Tel. Co.*, 304 U. S. 333, 351 (1938).

The character of *Jones & Laughlin* was explained, and its rationale was limited, in *Curtis* v. *Loether*, 415 U. S. 189, 194 (1974), where the Court noted that in the former case the Seventh Amendment claim was rejected on the ground that the case involved a statutory proceeding and not a suit at common law or in the nature of such a suit; and that the case merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme.

Even though *Jones & Laughlin's* ultimate rationale was grounded in the fact that an administrative proceeding was involved, the decision has obvious Seventh Amendment wording and overtones which have not been overturned or lessened; and this Court has neither rejected nor denigrated in any way the reasoning in *Jones & Laughlin* that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law."

3. *FLSA Cases*

The Court noted in *Curtis*, 415 U. S. at 196, that "we need not, and do not, go so far as to say that any award of monetary relief must necessarily be legal relief. See, e.g., *Mitchell* v. *De Mario Jewelry, Inc.*, 361 U. S. 288 (1960); *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946)" (footnote omitted).

Mitchell v. *De Mario Jewelry* involves a suit brought by the Secretary of Labor in the District Court to en-

join violations of § 15(a)(3) of the Fair Labor Standards Act of 1938, which makes it unlawful for an employer to discharge or discriminate against an employee because the employee has instituted a proceeding under the Act. The District Court granted an injunction against further discrimination and ordered reinstatement of three employees, but declined, without deciding whether it had jurisdiction, to order the employer to reimburse the employees for wages lost as a consequence of the unlawful discharge.

This Court reversed the judgment below and held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award reimbursement of lost wages even though § 17 of the Act as then framed withdrew from the Court jurisdiction, in an action to restrain violations of the Act, payment to employees of "unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." The Court concluded:

> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." 361 U. S. at 291-2.

The Court reasoned that the remedy of ordering reimbursement for loss of wages is not punitive, where the measure of reimbursement is compensatory only. Id., at 293.

In *Mitchell*, a Seventh Amendment jury trial right was not asserted directly, but the Court relied on equity's historical justifications for asserting its implied jurisdiction, strongly suggesting that no jury trial right would attach. Particularly the ruling in *Mitchell*, falling chronologically between *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood.*, 369 U. S. 469 (1962), must have been cognizant of the jury trial implications of relying entirely on an equitable rationale for granting monetary relief.

Suits brought under § 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 217, provide another example of a proceeding in which monetary awards combined with injunctive relief are available without a right to jury trial. *Paradise Valley Investigation and Patrol Services, Inc.* v. *Dunlop*, 521 F. 2d 1342 (9th Cir. 1975); *Wirtz* v. *Jones*, 340 F. 2d 901 (5th Cir. 1965).

The Court of Appeals considered that since § 626(b) of the ADEA incorporated the provisions of § 216 of the FLSA [see App., infra., p. 4a-5a] and that "it is settled that § 216(b) claims are legal in nature and uniformly accorded a jury trial" (Pet. for Cert., p. 5a), it follows that a private party bringing an action under ADEA is similarly entitled to a jury trial. This Court has never ruled on the issue of whether a private party under an FLSA suit is entitled to a jury trial, but assuming arguendo that he is entitled to same, that fact is not dispositive of the instant issue involved because private actions requiring jury trials under the FLSA do not, as do ADEA and Title VII proceedings, involve injunctive relief; only monetary relief is provided by the FLSA. Individual employees may not seek equitable relief in FLSA cases. *Powell* v. *Washington Post Co.*, 267 F. 2d 651 (D.C. Cir. 1959), and *Roberg* v. *Phipps*, 156 F. 2d 958 (2nd Cir. 1946). It is, there-

fore, seen that the right to jury trial does not depend simply on whether a private individual or a public official brings the action under the FLSA but it is a question of the type of remedy sought by the action. Accordingly, while there is no jury trial right when the Secretary of Labor seeks an injunction and the payment of back wages under § 17 of the FLSA, *Sullivan* v. *Wirtz*, 359 F. 2d 426 (5th Cir. 1966), cert denied 385 U. S. 852 (1966), the courts have also held that there is a right to jury trial when the Secretary of Labor brings an action under § 16(c) for purely monetary relief, *Wirtz* v. *Turner*, 330 F. 2d 11 (7th Cir. 1964).

Because the enforcement provisions of the ADEA incorporate by reference the provisions of the FLSA and utilize the administrative and enforcement machinery of that Act, it does not follow that the decisions dealing with jury rights in private actions under the FLSA apply equally to those under the ADEA. ADEA is a separate law, enacted at a different time, and aimed at a separate problem—discrimination on account of age in employment situations. *Cf., Usery* v. *Allegheny County Institution Dist.*, 544 F. 2d 148 (3rd Cir. 1976), holding that the Equal Pay Act is separate from the FLSA even though it is housed in the latter Act.

Relief under § 626 of the ADEA is "within the equitable discretion of the district court," *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368 (8th Cir. 1974), whereas relief under the FLSA is automatic and represents the difference between the amount of minimum wages due under the Act and the amount paid by the employer (or the payment of time and a half times the regular rate of pay for overtime hours worked and not compensated for). This contrast highlights both the "equitable nature" of private ADEA relief and supports the conclusion that actions by individuals

under ADEA are more closely analogous to actions by government officials under FLSA than to private actions under this statute.

For a complete analysis of the relationship between a private action brought under the FLSA and one under the ADEA, reference is made to *Morelock* v. *NCR Corp.*, 546 F. 2d 682 (6th Cir. 1976) (Pet. for Cert., pp. 12a-19a).

Both the ADEA and the FLSA provide for "liquidated damages" in cases of willful violations of the Act (App., infra, pp. 2a-3a). The award of liquidated damages, however, is a matter within the discretion of the district court by reason of the provisions of § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. *Hays* v. *Republic Steel Corp.*, 531 F. 2d 1307 (5th Cir. 1976), held that the district court in an ADEA action by individuals against an employer has discretion, pursuant to the provisions of the Portal-to-Portal Act, to not award liquidated damages where there is a willful violation of the Act but good faith on the part of the employer has been established. Similarly, in *Richard* v. *Marriott Corp.*, 549 F. 2d 303 (4th Cir. 1977), an action brought by individuals under the Fair Labor Standards Act for denial of the federal minimum wages, the court held that § 16(b) of the FLSA which provides for the payment of unpaid minimum wages and "an additional equal amount as liquidated damages," permits the district court "in its further discretion," to award a lesser amount of liquidated damages, or none at all, if the employer shows to the satisfaction of the court that the act giving rise to such action was in good faith and that he had reasonable grounds for believing that his act was not a violation of the FLSA.

4. *Section 1983 Cases*

It is true, as noted by the Court of Appeals (Pet. for Cert., p. 3a) that § 4(b) and (c) of the ADEA vests the district court with jurisdiction to grant "legal *or* equitable relief." The court below concluded that "the inclusion of the phrase 'legal . . . relief' empowers a Federal court to grant complainants the Constitutional right to a jury" (Pet. for Cert., p. 3a), presumably equating this language with vesting the district court with the right to grant both legal and equitable remedies. We consider that the Congressional draftsmen of the ADEA had no such purpose in mind. The phraseology "legal *or* equitable relief" is meant to indicate that an individual plaintiff in an ADEA case can, unlike an individual plaintiff in an FLSA case, seek legal relief in the form of back pay *or* injunctive relief in the form of reinstatement which would not be the situation under an FLSA action.

Analogous is the phraseology of 42 U.S.C. § 1983 which provides that persons who have been deprived of rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured "in an action at law, suit in equity *or* other proceeding for redress."[9]

The courts in *Harkless* v. *Sweeny Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), cert. denied

[9] 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

400 U. S. 991 (1971), and *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966) (en banc), considered that the equitable relief authorized by § 1983 was intended to be comprehensive and held that no jury trial rights attach to the back-pay issue. In *Smith*, the court dealt with plaintiff Negro nurses who had been discharged for eating in a cafeteria reserved by the hospital administration exclusively for whites. The court, relying only on § 1983, quoted that part of it authorizing suits in equity or other proper proceedings and held that where, as in *Smith*, the nurses were dismissed for protesting illegal discrimination, they were entitled to return to their jobs and that equity would restore them to their previous position by means of a back-pay order. The opinion's central concern was with the suitability of providing that relief under the statute. In a footnote disposing of the jury-trial issue, the court cited *NLRB* v. *Jones & Laughlin*, 301 U. S. 1 (1936) and *Agwilines* v. *NLRB*, 87 F. 2d 146 (5th Cir. 1936), for the proposition that a back-pay order forms an integral part of the equitable relief of reinstatement and that no jury trial rights attached.

See, *Cox* v. *Northern Virginia Transp. Commission*, 551 F. 2d 555 (4th Cir. 1976), an action brought under 42 U.S.C. § 1983, where it was held that "'back pay is an integral component of the equitable relief to which the employee is entitled" and plaintiff was not permitted to recover either punitive or compensatory damages for injury to her reputation. *Cf.*, *Paul* v. *Davis*, 424 U. S. 693 (1976), an action brought under 42 U.S.C. § 1983, where it was held that defamation by a state official is not a federal constitutional or statutory tort.

C. This case is not controlled by the Court's holding in *Curtis* v. *Loether*

Reliance upon the holding of this Court in *Curtis* v. *Loether*, 415 U. S. 189 (1974), for a jury trial in an ADEA action is misplaced. An effort to force the facts of this case and the provisions of the ADEA into the mold of *Curtis* simply will not succeed. There are significant differences between the statutory language authorizing remedial relief in Title VIII suits and ADEA suits.

Title VIII authorizes private plaintiffs to bring civil actions to redress violations of the fair housing provisions of that Act, and provides that

> "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and *may award to the plaintiff actual damages and not more than $1,000 punitive damages*, together with court costs and reasonable attorney fees. . . ." 42 U.S.C. § 3612 (emphasis added).

The contrast between the two Acts is striking. Title VIII clearly permits a party to seek legal relief and Congress characterized it as such. In contrast, however, the inference from the wording of ADEA is that Congress contemplated only equitable relief and hence the award of any monetary relief can only be viewed as part of that equitable remedy.

The Court stated in *Curtis*:

> "More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." 415 U. S. at 196 (footnote omitted).

Title VIII expressly provides for the recovery of actual and punitive damages. Actions in equity refuse to enforce a penalty and will not award punitive damages. *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916). Title VIII actions also authorize the recovery of actual damages as measured by a plaintiff's loss. In contrast, an action under ADEA cannot award punitive damages, and can only restore the status quo or make a restitutionary award. Thus, it was held in *Rogers* v. *Exxon Research and Engineering Co.*, 550 F. 2d 834 (3rd Cir. 1977), that an action by a former employee against his employer to recover for alleged age discrimination under the ADEA did not permit recovery of damages for pain and suffering or emotional and psychic distress, and that the Act provides for only the amount of lost earnings.

The Court in *Curtis*, while expressing no view on the jury-trial issue in a Title VII context, did deem a comparison of Title VIII with Title VII to be "instructive," and noticed the sharp contrast between the statutory language in Title VII under which the courts of appeals have characterized back pay "as an integral part of an equitable remedy, a form of restitution" with Title VIII's "simple authorization of an action for actual and punitive damages." Id., at 197.

Curtis also noted that in Title VII cases the courts "have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge" which contracts with Title VIII where "[t]here is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." Id., at 197.

Finally, *Curtis* notes the distinction that Title VII cases can be viewed as requiring the employer to disgorge funds wrongfully withheld from the plaintiff, e.g., *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), cert. dismissed under Rule 60, 404 U. S. 1006 (1971), but in actions under Title VIII there is no "sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff." Id., at 197.

CONCLUSION

The ADEA contains no express or implied provision concerning the right to a jury trial for alleged violations of the Act. The Act's meager legislative history does not reveal whether Congress contemplated or intended that issues be tried to juries. The action brought by respondent in this case involves rights and remedies of the sort traditionally enforced in an action at equity, rather than one at law, and, therefore, is not within the ambit of the Seventh Amendment.

Actions under the ADEA for employment discrimination on account of age are similar to actions brought under Title VII of the Civil Rights Act of 1964 for alleged discrimination on account of sex, race or national origin. The courts of appeals have uniformly held that a jury trial is not required in an action for reinstatement and back pay in Title VII actions, and the same result should follow in ADEA actions.

We urge, therefore, that the judgment of the court below be reversed, and that the judgment of the District Court striking respondent's demand for jury trial be stricken and that the action be placed on a non-jury calender, be reinstated.

Respectfully submitted,

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Dated: September 1977

APPENDIX

APPENDIX

Age Discrimination in Employment Act of 1967. As Amended

(29 U.S.C. 621, et seq., 81 Stat. 602, December 15, 1967)

• • •

PROHIBITION OF AGE DISCRIMINATION

SEC. 4. [29 U.S.C. § 623] (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

• • •

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

• • •

(f) It shall not be lawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

• • •

ENFORCEMENT

SEC. 7. [29 U.S.C. § 626] . . . .

• • •

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations

of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act; *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

• • •

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

• • •

LIMITATION

SEC. 12. [29 U.S.C. § 631] The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

Fair Labor Standards Act of 1938, As Amended

(29 U.S.C. 201, et seq., 52 Stat. 1060, June 25, 1938;
75 Stat. 65, May 5, 1961)

* * *

Investigations, Inspections, Records, and Homework Regulations

SEC. 11. [29 U.S.C. § 211] . . . .

* * *

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

* * *

Prohibited Acts

SEC. 15. [29 U.S.C. § 215] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * *

Penalties

SEC. 16. [29 U.S.C. § 216] (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * *

Injunction Proceedings

SEC. 17. [29 U.S.C. § 217] The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

Title VII of Civil Rights Act of 1964

(42 U.S.C. 2000e, et seq., 78 Stat. 253, July 2, 1964)

• • •

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN

SEC. 703. [42 U.S.C. § 2000e-2]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. [42 U.S.C. § 2000e-3]

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment

practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

• • •

Enforcement provisions

SEC 706. [42 U.S.C. § 2000e-5]

• • •

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .

• • •

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

• • •

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.